Troy Information Technology Malaysia Sdn Bhd v Nissen Technology Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-649–10 OF 2020
AKHTAR TAHIR J
28 FEBRUARY 2024

Evidence — Documentary evidence — Admissibility of — Defendant objected to admissibility of plaintiff's documents in bundle of documents — Documents objected were scanned documents — Whether documents were admissible — Evidence Act 1950 ss 32(b), 65 & 73A(2) — Rules of Court 2012 O 34 r 2(2)(e)

The defendant had objected to the admissibility of the plaintiff's documents placed in Part C of the bundle of documents filed in court. The defendant contended that the documents contravened the provisions of admissibility under the Evidence Act 1950 ('the Act') and therefore were inadmissible. The total number of documents contained in Part C were ten documents; seven were objected to as being scanned documents. The crux of the defendant's objection was that no certificates under s 90A of the Act were produced, which was a requirement for computer-generated documents. The plaintiff contended that the documents were admissible by virtue of O 34 r 2(2)(e) of the Rules of Court 2012 ('the ROC') and, in the alternative, ss 73A(2) and 32(b) of the Act.

Held, allowing the defendant's objection:

(1) Seven of the documents were scanned copies and going by the definition of primary documents, these seven documents were copies of original documents and therefore could not be regarded as primary evidence or primary documents. Further as these documents were scanned documents, they also could not be regarded as documents produced by computer. The words 'produced by computer' referred to documents that were prepared in the computer than generated from the computer. The seven documents were merely printed from computer and not produced by the computer (see paras 14–15).

(2) The seven documents were secondary documents. The plaintiff had not shown the existence of any of the circumstances in s 65 of the Act for the court to accept secondary documents as evidence. The plaintiff's reliance on the ROC was untenable as admissibility was governed under the Act. The condition precedent for the admissibility of documents under s 32 of the Act had not been shown or satisfied in this case. The plaintiff's

reliance on s 73A of the Act was also misplaced as the provision only provided for dispensation of the attendance of a witness under certain conditions but subject to the original document being produced. In this case the issue was not on the non-availability of the witness but rather as to the admissibility of the documents (see paras 16, 18 & 20–21).

[**Bahasa Malaysia summary**

Defendan telah membantah kebolehterimaan dokumen plaintif yang diletakkan di Bahagian C ikatan dokumen yang difailkan di mahkamah. Defendan berhujah bahawa dokumen itu melanggar peruntukan kebolehterimaan di bawah Akta Keterangan 1950 ('Akta') dan oleh itu tidak boleh diterima. Jumlah dokumen yang terkandung dalam Bahagian C ialah sepuluh dokumen; tujuh telah dibantah sebagai dokumen yang diimbas. Pokok bantahan defendan adalah bahawa tiada perakuan di bawah s 90A Akta dikeluarkan, yang merupakan keperluan untuk dokumen yang dijana oleh komputer. Plaintif berhujah bahawa dokumen itu boleh diterima menurut A 34 k 2(2)(e) Kaedah-Kaedah Mahkamah 2012 ('KKM') dan, sebagai alternatif, ss 73A(2) dan 32(b) Akta.

Diputuskan, membenarkan bantahan defendan:

(1) Tujuh daripada dokumen itu adalah salinan imbasan dan mengikut takrifan dokumen utama, tujuh dokumen ini adalah salinan dokumen asal dan oleh itu tidak boleh dianggap sebagai keterangan utama atau dokumen utama. Selain itu, dokumen ini adalah dokumen yang diimbas, ia juga tidak boleh dianggap sebagai dokumen yang dikeluarkan oleh komputer. Perkataan 'dikeluarkan oleh komputer' merujuk kepada dokumen yang disediakan dalam komputer daripada yang dihasilkan daripada komputer. Tujuh dokumen tersebut hanya dicetak daripada komputer dan tidak dikeluarkan oleh komputer (lihat perenggan 14–15).

(2) Tujuh dokumen itu adalah dokumen sekunder. Plaintif tidak menunjukkan kewujudan mana-mana keadaan dalam s 65 Akta untuk mahkamah menerima dokumen sekunder sebagai keterangan. Kebergantungan plaintif pada KKM tidak dapat dipertahankan kerana kebolehterimaan ditadbir di bawah Akta. Syarat duluan untuk kebolehterimaan dokumen di bawah s 32 Akta tidak ditunjukkan atau dipenuhi dalam kes ini. Kebergantungan plaintif pada s 73A Akta juga salah letak kerana peruntukan hanya memperuntukkan pelaksanaan kehadiran saksi di bawah syarat tertentu tetapi tertakluk kepada dokumen asal yang dikemukakan. Dalam kes ini isunya bukan mengenai ketiadaan saksi tetapi lebih kepada kebolehterimaan dokumen (lihat perenggan 16, 18 & 20–21).]

Legislation referred to

Evidence Act 1950 ss 32, 32(b), 61, 62, 63, 64, 65, 73(2), 73A, 90A, Part V
Rules of Court 2012 O 34 r 2(2)(e)

Chan Chang Yang (with Tan Chong Lii) (Teh & Lee) for the plaintiff.
Isa Aziz Ibrahim (with Wong Yun Loong) (Isa Aziz Ibrahim) for the defendant.

Akhtar Tahir J:

INTRODUCTION

[1] The defendant objected to the admissibility of the plaintiff's documents placed in Part C of the bundle of documents filed in court. The defendant contended that the documents contravened the provisions of admissibility under the Evidence Act 1950 and therefore were inadmissible.

[2] The court decided to determine the admissibility of the Part C of the bundle of documents before proceeding for the full trial of the matter. The court decided this approach as there would be ramifications if the court decided to rule in favor of the defendants, since one of the documents disputed is the agreement upon which the plaintiff's case is founded on.

PART C DOCUMENTS

[3] The total number of documents which were objected contained in Part C are ten documents. Seven documents are objected to as being scanned documents. This are the agreement between the plaintiff and the defendant, plaintiff's tax invoices to the defendant from 15 March 2017 to 8 December 2018, plaintiff's letter to the defendant dated 9 October 2019, RHB Bank account statement, payment voucher and supporting documents, the plaintiff's letter dated 14 February 2019 to JPJ, the plaintiff's letter dated 20 March 2019 to Pejabat Ketua Setiausaha Negara.

[4] One document objected to is the plaintiff's tabulation of account receivable summary for June 2016 until December 2018 which is derived from invoices which were not produced. Finally print out of email correspondence between plaintiff and defendant in relation to a meeting dated 31 January 2019.

SUBMISSION OF THE PARTIES

[5] The crux of the defendant's objection against the admissibility of the ten documents in Part C is that no certificates under s 90A of the Evidence Act

1950 were produced, which is a requirement for computer generated documents. A

[6] Section 90A of the Evidence Act 1950 stipulates as follows:

(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement. B

(2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used. C D

(3)(a) It shall be sufficient, in a certificate given under subsection (2), for a matter to be stated to the best of the knowledge and belief of the person stating it. E

(3)(b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.

(4) Where a certificate is given under subsection (2), it shall be presumed that the computer referred to in the certificate was in good working order and was operating properly in all respects throughout the material part of the period during which the document was produced. F

(5) A document shall be deemed to have been produced by a computer whether it was produced by it directly or by means of any appropriate equipment, and whether or not there was any direct or indirect human intervention. G

(6) A document produced by a computer, or a statement contained in such document, shall be admissible in evidence whether or not it was produced by the computer after the commencement of the criminal or civil proceeding or after the commencement of any investigation or inquiry, in relation to the criminal or civil proceeding or such investigation or inquiry, and any document so produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. H I

(7) Notwithstanding anything contained in this section, a document produced by a computer, or a statement contained in such document, shall not be admissible in evidence in any criminal proceeding, where it is given in evidence by or on behalf of the

person who is charged with an offence in such proceeding the person so charged with the offence being a person who was —

(a) responsible for the management of the operation of that computer or for the conduct of the activities for which that computer was used; or

(b) in any manner or to any extent involved, directly or indirectly, in the production of the document by the computer.

[7] The plaintiff's main contention is that the documents are admissible by virtue of O 34 r 2(2)(e) of the Rules of Court 2012 ('the Rules') which provides as follows:

(e) if the parties are unable to agree on certain documents, those documents on which agreement cannot be reached shall be included in separate bundles and each such bundle shall be filed by the plaintiff and marked as follows:

(i) Part B — documents where the authenticity is not disputed but the contents are disputed;

(ii) Part C — documents where the authenticity and contents are disputed;

[8] In the alternative the plaintiff also relies upon ss 73(2) and 32(b) of the Evidence Act 1950. Section 73(2) states as follows:

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence —

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

[9] Section 32(b) of the Evidence Act 1950 provides as follows:

(b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

COURT'S DECISION

[10] In the court's view the principal law on admissibility of documents is the Evidence Act 1950 ('the Act') specifically Part V of the Act which is entitled 'Documentary Evidence'.

[11] The most significant rule under this Part on admissibility of documents is as stated in s 61 of the Act which stipulates:

> The contents of documents may be proved either by primary or by secondary evidence.

[12] The Act further states in s 64 that 'Documents must be proved by primary evidence except in the cases hereinafter mentioned'.

[13] What are regarded as primary documents is defined in s 62 as follows:

> Primary evidence means the document itself produced for the inspection of the court.
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> Explanation 1 — Where a document is executed in several parts, each part is primary evidence of the document.
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> Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.
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> Explanation 2 — Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; *but where they are all copies of a common original they are not primary evidence of the contents of the original.*
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> Explanation 3 — *A document produced by a computer is primary evidence*.

[14] In this case seven of the documents are scanned copies and going by the above definition of primary documents, this seven documents are copies of original documents and therefore in the court's view cannot be regarded as primary evidence or primary documents.

[15] Further as this documents are scanned documents this documents also cannot be regarded as documents produced by computer. The word 'produced by computer' in the court's view refer to documents that are prepared in the computer than generated from the computer. In this case the seven documents being scanned documents cannot be regarded as documents produced by the computer. This documents are merely printed from the computer and not produced by the computer.

[16] The court regards the seven documents as secondary documents. The

definition of secondary documents is as stated in s 63 of the Act:

Secondary evidence includes —

(a) certified copies given under the provisions hereinafter contained;

(b) copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them;

(e) oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means.

[17] The conditions under which secondary documents can be adduced is as stated under s 65 of the Act as follows:

(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

(a) when the original is shown or appears to be in the possession or power —

(i) of the person against whom the document is sought to be proved;

(ii) of any person out of reach of or not subject to the process of the court; or

(iii) of any person legally bound to produce it, and when after the notice mentioned in section 66 such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

(2)(a) In the cases referred to in subsection (1)(a), (c) and (d) any secondary evidence of the contents of the document is admissible.

(2)(b) In the case referred to in subsection (1)(b) the written admission is admissible.

(2)(c) In the case referred to in subsection (1)(e) or (f) a certified copy of the document but no other kind of secondary evidence is admissible.

(2)(d) In the case referred to in section (1)(g) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

[18] In this case the plaintiff has not shown the existence of any of the above circumstances in allowing the court to accept secondary documents as evidence. The plaintiff's reliance on the Rules of Court 2012 is untenable as admissibility is governed under the Act. The Rules mere act as a guide to distinguish the various documents for ease of the proceedings. In no way the Rules displaces the Act on admissibility of documents.

[19] For the same reason above the document which tabulates information from other documents is a secondary document and does not fall under the category of secondary evidence admissible in court. The documents from which the information is taken are the actual primary document.

[20] The court further rules that the condition precedent for the admissibility of documents under s 32 of the Act have not been shown or satisfied in this case. The condition precedent are as stated in the provision as follows:

(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases.

[21] The plaintiff's reliance on s 73A of the Act is misplaced as the provision only provides for dispensation of the attendance of a witness under certain conditions but subject to the original document being produced. In this case the issue is not on the non-availability of the witness but rather as to the admissibility of document.

[22] In short the court allows the objection of the defendant on the admissibility of the ten documents in Part C of the bundle of documents although on a different ground as submitted by the defendant. The basis of the inadmissibility is the documents are secondary documents.

A CONCLUSION

[23] As one of the documents ruled as inadmissible by the court is the agreement between the plaintiff and the defendant upon which the whole of the plaintiff's case is founded upon, the defendant submitted that the
B plaintiff's claim is unlikely to succeed in the absence of the said agreement.

[24] The court agreed with the defendant and dismissed the plaintiff's claim with a cost of RM10,000.

C *Defendant's objection allowed.*

Reported by Nabilah Syahida Abdullah Salleh

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